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Veronique Ferrari

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EXAMINER

VENKAT, JYOTHSNA A

ART UNIT

PAPER NUMBER

1619

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 09/749,036	Applicant(s) FERRARI ET AL.	
	Examiner JYOTHSNA A. VENKAT	Art Unit 1619	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 May 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) See Continuation Sheet is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>6/11/08</u> . | 6) <input type="checkbox"/> Other: _____ |

Continuation of Disposition of Claims: Claims pending in the application are 121,132,137,143,144,147,153,157,158,161,166,169,170,172,177-180,183,218,219,221 and 223.

Continuation of Disposition of Claims: Claims rejected are 121,132,137,143,144,147,153,157,158,161,166,169,170,172,177-180,183,218,219,221 and 223.

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DETAILED ACTION

Receipt is acknowledged of amendment and remarks filed on 2/14/08. Receipt is acknowledged of response with regard to “request for information under 37 C.F.R. § 1.105” filed on 5/19/08. Receipt is also acknowledged of IDS filed on 6/11/08.

Amendment dated 2/14/08 canceled claims 122, 124, 127, 129, and 131.

Claims 1-120, 122-131, 133-136, 138-142, 145-146, 148-152, 154-156, 159-160, 162-165, 167-168, 171, 173-176, 181-182, 184-217, 220, 222 and 224-287 have been cancelled.

Claims 121,132, 137, 143,144, 147, 153, 157-158, 161,166, 169-170, 172, 177-180, 183, 218-219, 221, and 223 are pending and currently examined in the application.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 121,132, 137, 143,144, 147, 153, 157-158, 161,166, 169-170, 172, 177- 180, 183, 218-219, 221, and 223 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. **This is new matter rejection.**

There is no support in the specification for claims drawn to the species belonging to structuring polymer, which is “ethylenediamine/stearyl dimer tallate copolymer”.

Specification at page 15, ll 3-13 teaches:

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“Non-limiting examples of an at least one polyamide polymer which may be used in the composition according to the present invention include the commercial products sold by Arizona Chemical under the names Uniclear 80 and Uniclear 100. These are sold, respectively, in the form of an 80% (in terms of active material) gel in a mineral oil and a 100% (in terms of active material) gel. These polymers have a softening point ranging from 88°C to 94 °C, and may be mixtures of copolymers derived from monomers of (i) C36 diacids and (ii) ethylenediamine, and have a weight-average molecular mass of about 6000. Terminal ester groups result from esterification of the remaining acid end groups with at least one alcohol chosen from cetyl alcohol and stearyl alcohol. A mixture of cetyl and stearyl alcohols is sometimes called cetylstearyl alcohol”.

Initially it would appear that Uniclear® 80 and Uniclear® 100 refer to two products containing the same polymer base. The specification describes sources of diacids as resulting from the reaction of any of oleic acid, linoleic acid and linolenic acid with another compound containing 14 to 26 carbon atoms. Diacids are known in the art to result from the polymerization of unsaturated fatty acids (see US 5,783,657 at column 5).

The specification teaches the species, which can be formed from (i) C36 diacids and ethylenediamine and the terminal ester groups result from esterification of the remaining acid end groups can be with cetyl alcohol or the species can be formed from (ii) C36 diacids and ethylenediamine and the terminal ester groups result from esterification of the remaining acid end groups can be with stearyl alcohol or the species can be formed from (ii) C36 diacids and ethylenediamine and the terminal ester groups result from esterification of the remaining acid

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end groups can be with a mixture of cetyl and stearyl alcohols also known as cetylstearyl alcohol.

In response to Rule 105 request, applicants' submit as Exhibit 1 a redacted version of confidential proprietary documents from the Assignee Company (5/19/08). See below

Réf. Commerciale	Fabricant / Distributeur
UNICLEAR 100 VG	REDACTED
(DGT) UNICLEAR 100 VG	
Nom chimique R.A.D :	CONDENSAT DIACIDE EN C36 HYDROGENE ETHYLENE DIAMINE, ESTERIFIE PAR ALCOOL STEARYLIQUE (PM: ENVIRON 4000) STABILISE (ANOX 20)
Nom INCI USA :	ETHYLENEDIAMINE/STEARYL DIMER DILINOLEATE COPOLYMER

The redacted document shows that Uniclear®100VG is also known as ethylenediamine stearyl dimer dilinoleate copolymer and this species is described since linoleic acid is 18 carboxylic diacid and the dimer acid is C36 carboxylic acid.

However, the first page of the redacted document does not state that Uniclear®100 V is ethylenediamine/tall oil dimer acid/stearyl alcohol copolymer (emphasis added), which is ethylenediamine/stearyl dimer tallate copolymer . Compare page 2 to page 1.

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REDACTED

Nom Chimique : CONDENSAT DIACIDE EN C36 HYDROGENE/ETHYLENE DIAMINE, ESTERIFIE PAR
ALCOOL STEARYLIQUE

Nom CTFA :

REDACTED

Références commerciales

Références commerciales	Fournisseurs
UNICLEAR 100 V	REDACTED

REDACTED

Numéro de CAS	Nom CTFA substance	Nom européen substance	% sub.	Rôle	Type	Color index	% etiq.	N° cines
REDACTED	ETHYLENEDIAMINE/TALL OIL DIMER ACID/STEARYL ALCOHOL COPOLYMER				REDACTED			
	REDACTED							

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The preceding provides evidence that UNICLEAR 100V and UNICLEAR 100VG appear to be different products with the former a product resulting from the polymerization of linoleic acid and the latter a product resulting from polymerization of tall oil unsaturated fatty acids and one cannot conclude that any composition whose name includes UNICLEAR® necessarily includes the same polymer.

Applicants' in response to Rule 105 request also point out to Exhibit 1 submitted on 2/14/08. Exhibit 1 corresponds to International Cosmetic Ingredient Dictionary (CTFA, page 606, 2002) and this exhibit was submitted to show support for the amendment that recites the two species namely **ethylenediamine/stearyl dimer tallate copolymer** and **ethylenediamine/stearyl dimer dilinoleate copolymer**.

CTFA submitted on 2/14/08 is after the filing date of the instant application. Page 606 of CTFA states that ethylenediamine/stearyl dimer dilinoleate copolymer is a copolymer of ethylenediamine and stearyl dimer dilinoleate monomers and further reciting that a trade name for ethylenediamine/stearyl dimer dilinoleate copolymer is Uniclear®. The same page also recites that ethylenediamine/stearyl dimer tallate copolymer is a copolymer of ethylenediamine and tall oil dimer acid monomers, end blocked with stearyl alcohol and further recites that a trade name for ethylenediamine/stearyl dimer tallate copolymer is Uniclear®.

Thus CTFA only identifies Uniclear® and does not distinguish between Uniclear® 80, Uniclear® 100, Uniclear® 100V or Uniclear® 100VG.

In this regard the CTFA website states: *Trade Names are unique identifiers that are assigned to a cosmetic ingredient by the manufacturer or supplier of that ingredient. These*

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names are often designed to reflect a particular company's product line, and do not necessarily have any direct relationship to the chemical nature of the ingredient.

Applicant's redacted documents clearly indicate a plurality of polymers associated with UNICLEAR as of applicant's filing date.

This is made even clearer in the following:

Applicants' attention is drawn to Arizona Chemical Company website.

Air Care / Personal Care Gellants

Product	Softening Point, C, Ring & Ball	Viscosity cps/mPa-s @ 160 C	Acid No.	Color, Gardner	Amine No.	Flash Point, F
Uniclear® 100	88-100	90-140	12	1-2	≤1.0	520
Uniclear® 100LM	75-80	90-140	12	1-2	≤1.0	520
Uniclear® 100VG*	88-98	100-160	12	1-3	≤1.0	520
Sylvaclear™ C75V*	70-80	90-160	25	1-3	≤1.0	508

* Vegetable dimer based resin

The softening point and viscosity are different for Uniclear ® 100 and Uniclear ® 100 VG. Search on Arizona Chemical Company website did not show softening point and viscosity for Uniclear ® 100 V described at top portion of page 1 of the redacted copy. There is no Uniclear ® 80 described at page 15 of the specification on the website. Uniclear ® 100 VG has softening point, which is 88-98. Specification describes the softening point ranging from 88-94. The softening point and viscosity for Uniclear ® 100 and Uniclear ® 100LM are different from Uniclear ® 100 VG.

This evidence suggests that there are unspecified differences between the various UNICLEAR® products and that absent objective evidence one cannot conclude that the

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reference to UNICLEAR 100 in the instant specification refers to **ethylenediamine/stearyl dimer tallate copolymer.**

A further complication is that the CTFA from 2002 clearly sets forth that the UNICLEAR® is associated with both the dilinoleate species and the tallate species.

Therefore there is no support in the specification for species claimed, which is **ethylenediamine/stearyl dimer tallate copolymer.**

There is no support in the specification for claim 132 drawn to structuring polymer in the form of mixture of polymers. Claim 131 is drawn to structuring polymer, which can be either ethylenediamine/stearyl dimer dilinoleate copolymer or ethylenediamine/stearyl dimer tallate copolymer.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 132 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 132 lacks antecedent basis since claim 131 recites species and claim 132 recites mixtures of polymers.

Claim Rejections - 35 USC § 103

Claims 121, 132, 137, 143, 144, 147, 153, 157-158, 161, 166, 169- 170, 177- 180, 183, 218- 219, 221, and 223 are rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of U. S. Patents 5,783,657 ('657) and 6,019,962 ('962).

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1. The instant application is claiming a composition (claim 121) or various cosmetic products (claim 218) or a care product for the skin or deodorant product (claim 219) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223) comprising at least one *fatty phase*, which comprises:

1. At least one pasty fatty substance (species are claimed in claim 161)
2. ethylenediamine/stearyl dimer tallate copolymer or ethylenediamine/stearyl dimer dilinoleate copolymer
3. Additional fatty material (species are gums, fatty materials pasty at ambient temperature, resins of claims 157-158)
4. Coloring agent (claims 178-180)
5. Wax (claim 183)

Patent '657 teaches polymer claimed in the instant application (ingredient 2) having gel consistency and these gels are useful in personal care products where in some self-supporting consistency is desired. See the abstract and see cols. 3-4 and see col.3, lines 31-36 where patent teaches that these polymers are useful in cosmetic art. Patent at col.4, ll 20-25 teaches ester – terminated polyamide of formula I (ETPA).

The species claimed under ingredient 2 belong to the genus of this polymer. The species is formed from ethylenediamine, stearyl alcohol and tall oil fatty acid or linoleic acid. Patent at col.5, ll 1-20 describes the definition of R1 and the carbon range of 16-22 is the preferred range. Patent at col.5, ll 23-33 teaches the definition of R2 and at col.5, ll 39-40 teaches that typical unsaturated acids are linoleic acids and at col.5, ll 44-46 teaches that tall oil fatty acid is a

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preferred source of long-chain fatty acids. Patent at col.7, ll 24-35 teaches the preparation of ETPA . The starting materials for the ETPA are alcohols, amines and carboxylic acids are preferred starting materials (col.7, ll 24-25). Patent at paragraph bridging col.s 7-8 describes the monoalcohols and at col.8, line 3 describes preferred R1 and this includes stearyl alcohol (*one of the reactants, namely alcohols for the formation of both the claimed species*). Patent at col.8, ll 37-68 describes the second component, which is diacid and at col.9, ll 5-15 describes the acids and this includes linoleic acid (*one of the reactants, namely acids for the formation of ethylenediamine/stearyl dimer dilinoleate copolymer*) and describes the preferred fatty acid as tall oil fatty acid (*one of the reactant, namely acids for the formation of ethylenediamine/stearyl dimer tallate copolymer*). Patent at col.9, ll 24-28 describes that polymerized fatty acids are sold under the trade name UNIDYME®. Patent at col.10, ll 18-36 describes exemplary diamines and the ethylenediamine (*one of the reactants, namely amines for the formation of both the claimed species*) is the first diamine described at line 20. Patent at col.12 through col.13, line 45 describes in detail the preparation of ETPA resins.

Patent '657 at col.14, lines 30-42 teaches that the polymer can be formulated into various personal care products. This includes deodorant, eye make-up, lipstick, foundation make-up, bay-oil, skin moisturizers, sun care products, lip balm, ethnic hair care products.

Patent '657 at col.15, ll 1-10 teaches the amount of ETPA resin as 1-50% and this amount is within the weight percent claimed in claim 137.

Patent '657 at col.15, line 12 through col.16, line 33 teaches various low polarity liquids that can be combined with ETPA resins to form a gel (claim 169). Low polarity liquids are claimed in the instant application as non-volatile oils belonging to fatty phase (claims 143-144).

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Patent '657 at col.17, ll 25-26 suggests adding ingredients that are conventionally incorporated into personal care products and suggests that gels which are formed from ETPA resin and low-polarity liquids can be combined with water, colorants (claim 178), emulsifiers, and fillers and also teaches adding wax (claim 182).

Patent '657 does not teach the fatty phase being volatile and adding pasty substance (ingredient 1) or adding additional pasty substances (ingredient 3) or amount of colorant.

However patent '962 teaches compositions and method for using the compositions to improve the performance of long wearing cosmetic compositions. See the abstract. Patent at col.2, ll 23-25 teaches that the compositions can be used in conjunction with all types of cosmetic products. Patent at col.3, ll 45-50 teaches oils. These oils belong to claimed fatty phase. Patent at col.5, ll 15-16 teaches the compositions in the form of liquids and pates and solids and teaches at ll 19-26 solid formers and this includes waxes and solid oils. Patent at col.7, ll 39-52 teaches fatty alcohol waxes and describes tri isostearyl citrate, stearyl octanoate, tri stearyl citrate, tri lauryl citrate. All these belong to claimed past fatty substance and belong to esters of fatty alcohols of claim 161 under (ii). Patent under col.8, line 26 teaches lanolin wax and this belong to claimed past fatty substance. Patent at col.8, ll 36 et seq teaches solid oils and this also belong to claimed past fatty substance. See also col.9, ll 127 for solid oils. Patent '962 teaches claimed colorants at col.9, ll 29-52 and this includes colors, pigments, lakes and dyes. Examples 1-6 at col.16- col.19 teaches lakes or pigment and the percentages of these ingredients is within the weight percent claimed in claim 180. Examples 1-6 at col.16- col.19 teaches having either cyclomethicone or isododecane. Both these solvents are volatile solvents claimed in claim 153. Patent at col.9, ll 53-63 teaches adding emulsifiers and teaches amphiphilic materials such as

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polyol fatty acid esters can be used in the compositions. Patent under examples 1-6 (col.16-col.19) teaches various cosmetic products and this includes lip, liquid foundation, mascara, eyeliner, eye shadow. All these formulations have either silicone resin or silicone gum or both claimed in the instant application as additional fatty material (claims 157-158).

Accordingly, it would have been obvious to one of ordinary skill in the art at the time the invention was made to prepare compositions of by using the species belonging to ETPA of patent '657 that is formed from linoleic acid, stearyl alcohol and ethylenediamine and also the species formed from tall oil fatty acid, stearyl alcohol and ethylenediamine and combine it volatile solvent, colorants, wax s taught by patent '657 and combine it with pasty fatty substance and additional pasty fatty substance like silicone resins or silicone gums and use the weight percent taught by patent '962 in analogous cosmetic compositions. One of ordinary skill in the art would be motivated to combine polyamide gellant (species claimed) of '657 with the ingredients taught by patent '962 with the reasonable expectation of success that the compositions have the advantage of providing the consumer stable cosmetic products having structured property and gel property because of the polymer and also providing the consumer additional advantage of improving the performance of long wearing cosmetic products. This is a prima facie case of obviousness.

Claims 172 is rejected under 35 U.S.C. 103(a) as being unpatentable over the combination of U. S. Patents 5,783,657 ('657) and 6,019,962 ('962) as applied to claims 121,132, 137, 143, 144, 147, 153, 157-158, 161,166, 169-170, 177- 180, 183, 218-219, 221, and 223 above, and further in view of U. S. Patent 4,699, 924 ('924).

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Patents '657 and '962 teaches adding emulsifiers to the compositions. Patent '962 at col.9, ll 53-63 teaches adding emulsifiers and teaches amphiphilic materials such as polyol fatty acid esters can be used in the compositions. Patent '962 does not recite the HLB value of less than 12.

Patent '924 teaches skin treatment compositions and teaches adding amphiphilic compounds and teaches emulsifiers having HLB value 5-11 and at col.4, glyceryl monostearate (polyol fatty acid esters) and also various poly oxyethylene ethers and esters as emulsifiers having HLB less than 12 claimed in claim 172. Emulsifiers are added to stabilize the compositions when the compositions are in the form of emulsions. Patent '924 also teaches adding oils at col.7, ll 30-50 and this includes wax. Patent at col.7, ll 1-2 teaches that the compositions can be in the form solid, cream (emulsions), gelled, thickened or free flowing liquid.

Accordingly, it would have been obvious to one of ordinary skill in the art at the time the invention was made to prepare compositions of by using the species belonging to ETPA of patent '657 that is formed from linoleic acid, stearyl alcohol and ethylenediamine and also the species formed from tall oil fatty acid, stearyl alcohol and ethylenediamine and combine it with volatile solvent, colorants, wax s taught by patent '657 and combine it with pasty fatty substance and additional pasty fatty substance like silicone resins or silicone gums and use the weight percent taught by patent '962 in analogous cosmetic compositions and use the amphiphilic compound (belonging to emulsifiers) having HLB value of less than 12 of patent '924 in analogous skin care compositions. One of ordinary skill in the art would be motivated to combine polyamide gellant (species claimed) of '657 with the ingredients taught by patent '962 and the emulsifiers of '924 with the reasonable expectation of success that the compositions have

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the advantage of providing the consumer stable cosmetic products having structured property and gel property because of the polymer and also providing the consumer additional advantage of improving the performance of long wearing cosmetic products and the addition of amphiphilic compound with HLB value of less than 12 provide the additional advantage of incorporating polar fluids like water, or glycerin or propylene glycol to the compositions. This is a prima facie case of obviousness.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 121, 161, 218, 221 and 223 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4 of U.S. Patent No. 6,716,420 (‘420) in view of U. S. Patent 6,019,962 (‘962).

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2. Instant application is claiming composition (claim 121) or various cosmetic products (claim 218) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.
3. Patent '420 is claiming method for making up eyelashes and method for making mascara comprising the same copolymers along with coloring agent, preservative, neutralized stearic acid, and PVP and glyceryl stearate (amphiphilic compound).
4. However patent '962 teaches compositions and method for using the compositions to improve the performance of long wearing cosmetic compositions. See the abstract. Patent at col.2, ll 23-25 teaches that the compositions can be used in conjunction with all types of cosmetic products. Patent at col.3, ll 45-50 teaches oils. These oils belong to claimed fatty phase. Patent at col.5, ll 15-16 teaches the compositions in the form of liquids and pates and solids and teaches at ll 19-26 solid formers and this includes waxes and solid oils. Patent at col.7, ll 39-52 teaches fatty alcohol waxes and describes tri isostearyl citrate, stearyl octanoate, tri stearyl citrate, tri lauryl citrate. All these belong to claimed past fatty substance and belong to esters of fatty alcohols of clam 161 under (ii). Patent under col.8, line 26 teaches lanolin wax and this belong to claimed past fatty substance. Patent at col.8, ll 36 et seq teaches solid oils and this also belong to claimed past fatty substance. Patent under examples 1-6 (col.16-col.19) teaches various cosmetic products and this includes lip, liquid foundation, mascara, eyeliner, eye shadow.

Therefore it would be obvious prepare claimed compositions by using (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate

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copolymer of patent '420 and add (ii) pasty fatty substance taught by patent '962 used in analogous cosmetic compositions.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients, claimed in the patent '420. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448,450 (Bd. App. 1948).

Claims 121, 161, 218, 221 and 223 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 6,835,399 ('399).

Instant application is claiming composition (claim 121) or various cosmetic products (claim 218) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223)

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comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '399 is claiming a method for lengthening the eyelashes comprising the same ethylenediamine/stearyl dimer tallate copolymer along with dispersion of polymer particles that is film-forming. Claim 1 of patent '399 is drawn to genus and this polymer of formula I anticipates the species claimed in instant application. Claim 3 of patent '399 is the same species claimed in the instant application.

It would be obvious to use the compositions using the same polymer for lengthening the eyelashes claimed in patent '399.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948).

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Claims 121, 161, 218, 221 and 223 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-2 of U.S. Patent No. 6,869,594 ('594).

Instant application is claiming composition (claims 121 and 161) or various cosmetic products (claim 218) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '594 is claiming method for making up the eyelashes a comprising the same ethylenediamine/stearyl dimer tallate copolymer or ethylenediamine/stearyl dimer dilinoleate copolymer along with isododecane, coloring agent and preservative and water.

It would be obvious to use the compositions claimed in the instant application for lengthening eyelashes and when the claims of the application are drawn to method for making up keratin materials, there is overlap of subject matter since the patent is also claiming the same species claimed in the instant application.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a

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method claim indicates that the claim is open-ended and allows for additional steps.");

Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997)

("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). In re Gray, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); Ex parte Davis, 80 USPQ 448, 450 (Bd. App. 1948).

Claims 121, 161, 218, 221 and 223 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,881,400 ('400).

Instant application is claiming composition (claims 121 and 161) or various cosmetic products (claim 218) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '400 is claiming a process for increasing the adhesion of make-up on eyelashes comprising the same ethylenediamine/stearyl dimer tallate copolymer along with coloring agent and preservative and (isododecane or silicone oil as the fatty phase in dependent claims)..

It would be obvious to use the compositions for voluminizing the eyelashes. It is also obvious to use mascara for voluminizing the eyelashes. Voluminizing the eyelashes are same as increasing the adhesion claimed in the patent.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients in the patent. The transitional term "comprising", which is synonymous with

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"including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948).

Claims 121, 161, 218, 221 and 223 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 7 of U.S. Patent No. 6,979,469 ('469).

Instant application is claiming composition (claims 121 and 161) or various cosmetic products (claim 218) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '469 is claiming a method of making up eyelashes comprising applying to the eyelashes a mascara composition comprising same ethylenediamine/stearyl dimer tallate

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copolymer or ethylenediamine/stearyl dimer dilinoleate copolymer along with inert filler (kaolin or PTFE), coloring agent and preservative, water.

The compositions claimed in the instant application can be used for making up eyelashes and there is overlap of subject matter when the claims are drawn to mascara or make-up composition for keratin material.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948).

Claims 121, 161, 218, 221 and 223 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-2 of U.S. Patent No. 7,008, 619 ('619).

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Instant application is claiming composition (claims 121 and 161) or various cosmetic products (claim 218) or a care and/or treatment and/or make-up composition for keratin fibers or skin or lips (claim 221) or a method for care, make-up or treatment of keratin materials (claim 223) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '619 is claiming method for making up eyelashes and method for making mascara comprising the same ethylenediamine/stearyl dimer tallate copolymer along with coloring agent, preservative, neutralized stearic acid, and dependent claims are claiming PVP and glyceryl stearate. Method of making up eyelashes claimed in the patent is a composition claimed in the instant application.

The compositions claimed in the instant application can be used for making up eyelashes and there is overlap of subject matter when the claims are drawn to mascara or make-up composition for keratin material.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997)

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("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). In re Gray, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); Ex parte Davis, 80 USPQ 448,450 (Bd. App. 1948).

Claims 121 and 161 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 24 and 27 of U.S. Patent No. 7,008,629 ('629).

Instant application is claiming composition (claims 121 and 161) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '629 is claiming a composition comprising polyamide of formula I and apolar oil and fibers. The polymer of claim 1 of patent '629 anticipates the species claimed and the species claimed in claims 24 and 27 of patent are same to that claimed in the instant application.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredient claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., Mars Inc. v. H.J. Heinz Co., 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). Invitrogen Corp. v. Biocrest Mfg., L.P., 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are

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essential, but other elements may be added and still form a construct within the scope of the claim). In re Gray, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); Ex parte Davis, 80 USPQ 448,450 (Bd. App. 1948).

Claim 223 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 7 of U.S. Patent No. 7,011,823 ('823).

Instant application is claiming a method for care, make-up or treatment of keratin materials (claim 223) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '823 is claiming a method of making mascara comprising same ethylenediamine/stearyl dimer tallate copolymer or ethylenediamine/stearyl dimer dilinoleate along with coloring agent, water, filler, which can be silica or kaolin or PTFE.

Method for make-up of keratin materials using the two copolymers claimed in the instant application is same as method for making mascara claimed in the patent using the same two copolymers.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., Mars Inc. v. H.J. Heinz Co., 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). Invitrogen Corp. v. BiocrestMfg., L.P., 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a

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method claim indicates that the claim is open-ended and allows for additional steps.");

Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997)

("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). In re Gray, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); Ex parte Davis, 80 USPQ 448, 450 (Bd. App. 1948).

Claims 121 and 161 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 of U.S. Patent No. 7,052,681 ('681).

Instant application is claiming composition (claims 121 and 161) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '681 is claiming a composition comprising polyamide of formula I and fatty phase comprising fluoro oil. The composition of patent '681 anticipates the instant composition since the polymer claimed in the patent is genus and the copolymers claimed in the instant application are species. The claimed fatty phase is inclusive of fluoro oil claimed in the patent '681.

Claims 121, 161 and 172 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 9 of U.S. Patent No. 7,144,582 ('582).

Instant application is claiming composition (claims 121 and 161) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance and dependent claim 172 is drawn to amphilic compounds which are liquid at room temperature and HLB value of less than 12.

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Patent '582 is claiming a composition comprising polyamide of formula I and dyes and amphiphilic compound and composition does not have wax and claim 9 of patent is drawn to two species belonging to polymer of formula I. The composition of patent '582 anticipates the instant composition since the polymer claimed in the patent is genus and the copolymers claimed in the instant application are species. Claim 9 of patent is drawn to the same species claimed in the instant application.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948).

Claims 121 and 161 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 7,276,547 ('547).

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Instant application is claiming composition (claims 121 and 161) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '547 is claiming a composition comprising same ethylenediamine/stearyl dimer tallate copolymer or ethylenediamine/stearyl dimer dilinoleate along with oil soluble polymer chosen from alkyl celluloses and alkylated guar gums. There is overlap of subject matter with respect to the two copolymer species and fatty phase claimed in the patent and instant application.

The expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent, which is alkyl cellulose or alkylated guar gums.. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open- ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448,450 (Bd. App. 1948).

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Claims 121, 161 and 218 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 19-21 and 28-29 of U.S. Patent No. 7,314,612 ('612).

Instant application is claiming composition (claims 121 and 161) and various cosmetic products (claim 218) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance.

Patent '612 is claiming a composition of formula I and claims 28-29 are drawn to species belonging to formula I and claim 18 is drawn to a mascara, an eyeliner, a foundation, a lipstick, a blusher, a make-up-removing product, a make-up product for the body, an eye shadow, a face powder, a concealer product, a nail composition, a shampoo, a conditioner, an anti-sun product or a care product for the skin, lips, or hair or a make-up and /or care and /or treatment composition for keratin fibers or a treatment, care or make-up composition for keratin fibers or a method for care, make up or treatment of a keratin material comprising a fatty phase, which comprises same ethylenediamine/stearyl dimer tallate copolymer or ethylenediamine/stearyl dimer dilinoleate. Independent claims 1 and 19 of patent are drawn to genus of and this genus anticipates instant composition claims and various cosmetic products. Claims 20-21 and 28-29 of patent claims the same species and there is overlap of subject matter with regard to species.

The expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent, which is gelling agent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., Mars Inc. v. H.J.

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Heinz Co., 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948).

Claim 218 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 31 of U.S. Patent No. 7, 410, 636 ('636).

Instant application is claiming various cosmetic products (claim 218) comprising fatty phase, which comprises (i) ethylenediamine/stearyl dimer dilinoleate copolymer and ethylenediamine/stearyl dimer tallate copolymer and (ii) pasty fatty substance. Mascara is claimed in claim 218.

Patent '636 is claiming a mascara comprising polymer of formula I and this formula anticipates the species claimed in instant application.

Additionally, the expression "comprising" in the claims is inclusive of the unrecited ingredients claimed in the patent. The transitional term "comprising", which is synonymous with "including," "containing," or "characterized by," is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See, e.g., *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 USPQ2d 1837, 1843 (Fed. Cir. 2004) ("like the term comprising,' the

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terms containing' and mixture' are open-ended."). *Invitrogen Corp. v. BiocrestMfg., L.P.*, 327 F.3d 1364, 1368, 66 USPQ2d 1631, 1634 (Fed. Cir. 2003) ("The transition comprising' in a method claim indicates that the claim is open-ended and allows for additional steps."); *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501, 42 USPQ2d 1608, 1613 (Fed. Cir. 1997) ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim). *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931); *Ex parte Davis*, 80 USPQ 448, 450 (Bd. App. 1948).

Non-patent literature from Arizona Chemical Company titled "Formulating Personal Care Products with Polyamide Gellants" is pertinent art. The publication date is not known to the examiner.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTHSNA A. VENKAT whose telephone number is 571-272-0607. The examiner can normally be reached on Monday-Friday, 10:30-7:30: 1st Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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